84-1245

No. - .

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In the Supreme Court of the United States.

October Term, 1984

JOHN JOSEPH BURKE, et als.,
Petitioners

v.

ATLANTIC RESEARCH CORPORATION, et als.
Respondents

**Petition for a Writ of Certiorari,
On Appeal from the
Supreme Judicial Court of Massachusetts**

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Parties

JOHN JOSEPH BURKE, MARY TERESA BURKE, and ANN FRANCIS BURKE
vs.
ATLANTIC RESEARCH CORPORATION, LOUIS PASQUALUCCI & SONS, INC.

Questions Presented for Review

I. WHETHER THE PRECLUSION OF A MINOR OFFSPRING'S OTHERWISE VIABLE CAUSE OF ACTION IN TORT FOR LOSS OF PARENTAL SOCIETY, BASED ON THE STANDARD SET FORTH IN FOOTNOTE 12 OF Ferriter v. Daniel O'Connell's Sons, Inc., 381 MASS 507, 516-517, 413 N.E. 2d 690, 696 (1980) (A25), CONSTITUTES A DENIAL OF DUE PROCESS OF LAW, IN VIOLATION OF THE UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, SEC. 1 (A26).

II. WHETHER THE SEVERING OUT OF THE DISCRIMINATING AGAINST A CERTAIN GROUP OF INDIVIDUALS WITHIN A PARTICULAR CLASS, SPECIFICALLY, ALL CHILDREN WHO HAVE BEEN BARRED FROM INSTITUTING A CAUSE OF ACTION FOR LOSS OF PARENTAL SOCIETY BECAUSE OF THE APPLICATION OF FOOTNOTE 12 OF THE Ferriter DECISION (A25), IS A DENIAL OF EQUAL PROTECTION UNDER THE LAW, IN VIOLATION OF THE UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, SEC. 1 (A26).

Jurisdictional Ground

Petitioners seek review of an order entered on November 5, 1984 by the supreme Judicial Court for the Commonwealth of Massachusetts. As grounds for such review Petitioners state that the application of footnote 12 of Ferriter v. Daniel O'Connell & Sons, Inc., 381 Mass 507, 516-517, 413 N.E. 2d 690, 696 (1980) (A25) violates both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution (A26). The Petitioners have exhausted their remedies at the Massachusetts State Court level and now seek a determination of this matter before the United States Supreme Court.

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Statement of the Case

Petitioners in this Petition are the children of John Burke (their mother, Mary Burke, has been removed as a petitioner because all other petitioners are adults) (A24). Their claim is for loss of his care, comfort and society due to John Burke's injury at work on June 26, 1968 (A19-20).

The action was commenced on June 15, 1983 (A19). Petitioner John Joseph Burke was born June 25, 1963 and Petitioners Mary Teresa and Ann Francis Burke, twins, were born on December 29, 1964 (A19).

Respondant, Louis Pasqualucci & Sons, Inc. ("Pasqualucci") was Mr. Burke's employer and Petitioners allege Respondant, Atlantic Research Corporation ("Atlantic") owned or controlled the premises where his injury occured (A19-20). Petitioners seek damages from both Respondants for negligently causing Mr. Burke's injury jointly or severally (A19). Respondants never answered these allegations as their motion to dismiss, brought prior to filing an answer, was allowed (A7)(A8-14)(A22)(A23)

This is a companion case to the one brought by the workmen's compensation insurer, Hartford Accident and Indemnity Company ("Hartford") (originally commenced in Mr. Burke's name but later amended to name Hartford as the plaintiff) against Atlantic for Mr. Burke's injury. Hartford has paid Mr. Burke workmen's compensation since the accident. That complaint was filed in 1969 in Superior Court, County of Suffolk, Commonwealth of Massachusetts, Civil Docket number 646488. Mrs. Burke moved to intervene and add Pasqualucci as a defendant, to raise her loss of consortium claims and her children's (the present Petitioners) loss of parental care claims against both Atlantic and Pasqualucci. That motion was denied in January, 1983 and the case was settled in 1983 over Mrs. Burke's objection

(action as Mr. Burke's guardian). Mrs. Burke appealed from the judgment incorporating the settlement and from the denial of her motion to intervene. The Supreme Judicial Court for the Commonwealth of Massachusetts allowed Hartford and Atlantic's Application for Further Appellate Review.

In the instant case both Atlantic and Pasqualucci moved to dismiss based on the alleged pendency of the companion case and on the statute of limitations(A22)(A23) Justice Robert Steadman allowed their motions, as set forth in his August 9, 1983 memorandum and order (A8-14. The final judgment entered on September 21, 1983 (A7). The Petitioners thereafter filed an appeal to the Order of Dismissal of this action to the Commonwealth of Massachusetts Appeals Court where it was consolidated with Appeal Number 83-691 for oral argument (A18). Justice Raya S. Dreben presided over the appeals, and on August 29, 1984 set forth an Ordr vacating the judgment in case number 83-691 and affirming the dismissal of the action in case number 83-1328 (A8-14).

The Petitioners thereafter filed an Application for Further Appellate Review to the Supreme Judicial Court for the Commonwealth of Massachusetts. This application was denied on November 5, 1984 (A2).

Petitioners first raised the federal questions presented in this Petition during oral argument in their opposition to the Respondants pre-answer motion to dismiss the complaint brought in the Superior Court, County of Suffolk, Commonwealth of Massachusetts, civil Docket number 62272. Justice Steadman of Suffolk Superior Court held that the Petitioners' claims were explicitly time-barred by the holding of the Supreme Judicial Court for the Commonwealth of Massachusetts in Ferriter v. Daniel O'Connells' Sons, Inc., 381 Mass 507, 413 N.E. 2d 690 (1980). The Court dismissed

the Petitioners' argument that the Ferriter holding denied them their constitutional rights to due process and equal protection (A-3).

Petitioners again raised the federal questions in the Commonwealth of Massachusetts Appeals Court in their brief and during oral argument. The Appeals Court found that footnote 12 in Ferriter, supra, at 516-517 (A25), was controlling and therefore the Petitioners' cause of action was time barred. Since the Court found the wife's claim was barred after June, 1970 under Mass. Gen. Laws ch. 260, § 2A, prior to its amendment by St. 1973, c. 777 sec. 1 the Court held that Petitioners' claims must fail. Gore v. Daniel O'Connells' Sons, 17 Mass. App. Ct. 645, 649-650 (1984); Armstrong v. Carlyle Construction Co., 532 F. Supp 939, 941 (D. Mass 1982); Diaz v. Eli Lilly & Co., 364 Mass. 153, 167 (1973). The Appeals Court never addressed the constitutional arguments raised by the Petitioners (A-14).

Petitioners raised the federal questions in their Petition for Further Appellant Review to the Supreme Judicial Court for the Commonwealth of Massachusetts. The Supreme Judicial Court denied the petition (A2).

Argument

1. The preclusion of a minor offspring's otherwise viable cause of action in tort for loss of parental society, based on the standard set forth in footnote 12 of Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass 507, 516-517, 413 N.E. 2d 690, 696 (1980) (A-25) constitutes a denial of due process of law in violation of the United States Constitution Fourteenth Amendment, sec. 1 (A-26).

It has been recognized in Massachusetts that, "it is elementary and fundamental that every individual is entitled to his own day in Court in which to assert his own rights or to defend against their infringment". Pesce v. Brecher, 302 Mass 211, 19 N.E. 2d 36 (1939). The United States Supreme Court has also stated that, "a fundamental requisite of due process of law is the opportunity to be heard." Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

The Petitioners contend that footnote 12 of Ferriter, supra., P. 516-517, as interpreted by the Massachusetts Courts and in other cases (See Armstrong v. Carlyle Construction Co., 532 F. Supp. 939, 941 (D.C. Mass., 1982)), is a denial of due process under the law because it precludes them their opportunity to be heard. Said footnote acts to bar a separate and independant, viable cause of action, which was first recognized, but not created in the Ferriter decision. Ferriter, supra., P. 515-517 (A25).

If these interpretations were correct, the Massachusetts Court would, in effect, be stating that the Burke children have had a cause of action since 1968, which was formally recognized in 1980, but because their mother is time-barred from suit on a separate and independant cause of action for loss of consortium, they are forever barred from being heard on their viable cause of action, regardless of the fact that

their actions were timely under Mass. Gen. Laws ch. 260 §7 (A26).

The Massachusetts Supreme Judicial Court in Diaz v. Eli Lilly & Co., 364 Mass 153, 302 N.E. 2d 555 (1973) sought to preclude those claims that have had a full and fair opportunity to be heard from asserting a new cause of action after they had reached their finality. The Ferriter decision, however, as applied by the Massachusetts Courts, transgresses constitutional boundaries and violates the Petitioners' constitutional right to due process of law.

In support of this contention that the Petitioners' constitutional rights under the United States Constitution have been infringed, the Petitioners offer several arguments.

In Massachusetts, a minor lacks the capacity to sue on his own behalf. Mass. Gen. Laws ch. 201, §34 (A25); Mass. R. Civ. P. Rule 17 (b) (A26). The Petitioners herein were minors when their cause of action arose, and were still minors when the Ferriter case was decided in 1980. Hence, they lacked the capacity to institute a claim for loss of parental society during that entire period.

Any argument which proposes that these children were not unduly prejediced during that time because their mother could have filed suit on their behalf before Ferriter does not hold up. The Petitioners' mother could not waive or relinquish their claim for them, as only a duly appointed guardian or next friend could do so. Mass. Gen. Laws ch. 201 §34 (A25). Therefore, her failure to bring suit cannot deprive the Petitioners of their consititutional right to due process.

Further, the Massachusetts Legislature has enacted a tolling statute, Mass. Gen. Laws ch. 260 §7 (A26), to preserve the rights of minors and ensure that they will have an opportunity to be heard within a specified time after their disability is removed. Once a person reaches majority, he may sue on his own behalf, and it is apparent that the

Legislature has acted in Mass. Gen. Laws ch. 260 §7 (A26) to protect the minor's rights for himself.

In addition, the Massachusetts Court has held that the right to bring a tort suit is a property right and protected by United States Constitution, Fourteenth Amendment, sec. 1 (A26) against deprivation without due process. Mulvey v. Boston, 197 Mass. 178, 183, 83 N.E. 402, 404 (1908). Therefore, the Petitioners have held a property right in their cause of action for loss of parental society for many years before the Ferriter decision. Yet, as of the date which that opinion was handed down, that property right has been ruled to no longer exist, based on the arbitrary fact that a separate and independent cause of action, that of loss of spousal consortium, has been time-barred. The Petitioners state that this is precisely the sort of deprivation without due process which the United States constitution, fourteenth Amendment, sec. 1 (A26) seeks to prevent.

2. The severing out of and discriminating against a certain group of individuals within a particular class, specifically, all children who have been barred from instituting a cause of action for loss of parental society because of the application of footnote 12 of the Ferriter decision (A26) is a denial of equal protection under the law in violation of the United States Constitution, Fourteenth Amendment, sec. 1 (A26).

The Justices of the Supreme Judicial Court for the Commonwealth of Massachusetts have stated that equal protection of the law requires that all persons in the same category and in the same circumstances be treated alike. In re Opinion of the Justices, 332 Mass. 769, 780, 126 N.E. 2d 795, 801, (1955). If the Ferriter decision were interpreted to bar the claims of children while they are still minors, that would put minors with loss of parental care claims in a separate class from all other minors whose claims survive under Mass. Gen. Laws ch. 260, §7 (A26) until majority.

No rational reason has been offered for such a distinction; hence it is a denial of equal protection, violating the United States Constitution, Fourteenth Amendment, sec. 1 (A26).

Such a distinction would be constitutional if it were reasonable and based on some difference between the classes which is related to the object or purpose of the law. Reed v. Reed, 404 U.S. 71, 76, 92 S. Ct. 251, 254, 30 L. Ed. 2d 225 (1971); 16A Am. Jur. 2d, Constitutional Law, § 752, pp. 828-832. The purpose of Ferriter was to recognize a child's claim for loss of parental care. That purpose is not furthered adn is actually thwarted by the Court's interpretation of the Ferriter holding. The Petitioners are classified not only separately from children with other causes of action who are protected by Mass. Gen. Laws ch. 260, § 7 (A26), but also separately from those who claim loss of a father's care and whose mothers have filed or may yet file timely loss of consortium claims. There is no reason to distinguish between children whose mothers have or have not preserved their consortium claims. Such a distinction is arbitrary and a denial of equal protection under the United States Constitution, Fourteenth Amendment, sec. 1 (A26).

Conclusion

The Scope of the constitutional issues presented in this Petition for Certiorari potentially may extend far beyond the boundaries of this single case involving the Burke children of the Commonwealth of Massachusetts. As of 1971, 43 jurisdictions recognized a cause of action for loss of consortium. Lombardo v. D.F. Frangioso & Co., 359 Mass 529, 535, 269 N.E. 2d 836, 839, 840 (1971) (dissenting opinion). The Commonwealth of Massachusetts followed this trend in 1973 when it first recognized such a cause of action. See, Diaz v. Eli Lilly, supra.

In 1981, the Supreme Judicial Court of Massachusetts extended their reasoning for recognizing a cause of action for loss of spousal consortium one logical step further when it recognized a cause of action for loss of parental society. Ferriter, supra. Subsequent to the Ferriter decision, the state of Michigan has recognized the existence of a cause of action for loss of parental society. Berger v. Weber, 411 Mich. 1, 14, 303, N.W. 2d 424, 426 (1981).

In view of the nationwide recognition of the cause of action for loss of consortium, it seems possible, if not probable, that other states will proceed in a similar direction to Massachusetts and recognize a cause of action for loss of parental society. Further, when confronted with the task of drafting appropriate guidelines for such a cause of action, it is likely that one would look to a jurisdiction that has already recognized this cause of action to obtain guidelines and direction relative to such an implementation.

This Petition addresses the constitutionality of the limitations placed upon claims that pre-existed the recognition of a parental society cause of action as put forth by the Supreme Judicial Court for the Commonwealth of Massachusetts, and Petitioners argue that if other states were to adopt the

Massachusetts standard used to determine the viability of such claims, then those jurisdictions likewise would be acting in an unconstitutional fashion.

The extreme likelihood that other jurisdictions will adopt or otherwise utilize the Massachusetts standard set forth in the Ferriter decision, as it is one of the two jurisdictions that recognize the cause of action in question, makes this matter ripe for a determination by the Supreme Court of the United States. A prompt decision at a time when this cause of action is in its infantile stages nationwide could serve to guide all other jurisdictions in the future in a direction that is constitutional.

With the probability of these national ramifications in mind, the Petitioners pray that their claims be heard.

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Docket

Suffolk: SS
Superior Court

No. 62272
Action: Tort Jury

JOHN JOSEPH BURKE, et als.

v.

ATLANTIC RESEARCH CORPORATION et al.

Plaintiffs:	Defendants:
Mary Teresa Burke	Louis Pasqualucci & Sons, Inc.
Ann Frances Burke	

1983	No.	
June 15	1	Complaint and Jury Demand
July 15	4	Motion of defendant Louis Pasqualucci & Sons, Inc. to Dismiss
July 27	5	Motion of defendant Atlantic Research Corp. to Dismiss, & for Costs
July 29	6	Plaintiff's motion to amend complaint
Aug 9	7	Memorandum & order on defendant's Motions to Dismiss
Sept 23	9	Judgment on Motion to Dismiss
Sept 30	11	Plaintiff's Notice of Appeal
Nov 16	12A	Statement of Proceedings filed in Court (Steadman, J.)

Commonwealth of Massachusetts

Supreme Judicial Court for the Commonwealth,
At Boston,

November 5, 1984

Order

It is hereby ordered, that the Application for Further Appellate Review filed by the intervener/appellant in the following case by denied:

FAR-3218

JOHN JOSEPH BURKE & others[1]

vs.

ATLANTIC RESEARCH CORPORATION & another[2]
(Suffolk Superior Court No. 62272; A.C. No. 83-1328)

It is further ORDERED, that the Joint Application for Further Appellate Review filed by the plaintiff/appellee (Hartford Accident and Indemnity Company) and the defendant/appellee (Atlantic Research Corporation) be allowed:

FAR-3218

HARTFORD ACCIDENT AND INDEMNITY
(as amended), MARY TERESA BURKE

vs.

ATLANTIC RESEARCH CORPORATION
(Suffolk Superior Court No. 646629; A.C. No. 83-691)

[1] Mary Teresa Burke and Ann Francis Burke
[2] Louis Pasqualucci & Sons, Inc.

By the Court,
(signed)
Frederick J. Quinlan
Assistant Clerk

November 5, 1984

Commonwealth of Massachusetts

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO. 62272

JOHN JOSEPH BURKE an another[1]

v.

ATLANTIC RESEARCH CORPORATION and another[2]

MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs, the three children of John J. Burke ("Burke"), bring this action to recover for the loss of their father's care, comfort and society. Burke was injured on June 26, 1968, while working for defendant Louis Pasqualucci & Sons, Inc. ("Pasqualucci"). Defendant Atlantic Research Corporation ("Atlantic") was the general contractor on the project.

Pasqualucci and Atlantic move for dismissal under Mass. R. Civ. P. 12(b)(9), on the ground that a prior action is pending in a court of this Commononwealth. All parties additionally have argued the effect of the Statute of Limitadtions on this action; the Court therefore interprets the

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[1] Mary B. Burke, as next friend of Mary Teresa and Ann Francis Burke.

[2] Louis Pasqualucci & Sons, Inc.

motions to dismiss as encompassing the Statute of Limitations as well. The defendants further move this Court to award them costs.

After his accident, Burke claimed and received Workmen's Compensation from Pasqualucci's compensation carrier, The Hartford Accident and Indemnity Co. ("Hartford"). On July 23, 1969, Hartford filed a complaint in the name of Burke against Atlantic, as a third party liable for the injury, pursuant to G.L. c.152, § 15. On May 9, 1980, the motion of Mary B. Burke, Burke's wife, to intervene as a party plaintiff in order to assert a claim of loss of consortium was denied on the ground that it was time-barred under Diaz v. Eli Lilly & Co., 364 Mass. 153, 167 (1973).

On August 14, 1980, Hartford's motion to substitute itself as a party plaintiff was assented to and allowed.

On January 21, 1983, the named parties appeared before a justice of the Superior Court who approved a settlement, pursuant to G.L. c.152, § 15. At that time, Mary Burke and the three children moved to intervene to assert claims of loss of consortium and loss of parental society. The Court denied their motions and, on February 24, 1983, also denied their motions to vacate the judgment and to reconsider. The Burkes appealed the orders denying their motions. Their appeal is pending before the Appeals Court, under docket number 83-691.

Defendants' reliance on Mass.R.Civ.P. 12(b)(9) is misplaced. While similar issues are pending before the Appeals Court, the named parties of that case are Hartford and Atlantic only. Because neither Pasqualucci nor the Burkes were named parties in the prior action, this Court appears to have jurisdiction in the instant case.

Plaintiff's claims, however, are explicitly time-barred by the holding of the Supreme Judicial Court in Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507 (1980).

There the Court stated that "(f)or reasons similar to those expressed in Diaz [v. Eli Lilly & Co., supra at 167], we declare that, where a spouse's claim for loss of consortium has been concluded by judgment or settlement or the running of limitations before this opinion comes down, no child's actions for loss of parental society thereafter instituted and arising from the same incident will be allowed, even if that action would not otherwise be barred by limitations." Ferriter, supra at 516-517, n.12.

Mrs. Burke's claim for loss of consortium was barred by the running of the Statute of Limitations on June 27, 1970, see the pre-1974 version of G.L. c.260, § 2A, well before the Ferriter decision was handed down on September 9, 1980. Thus, the children's cause of action comes squarely within the Curt's holding, even if ordinarily they would have had until their twentieth birthdays to bring suit. See G.L. c.260, § 7, and the pre-1974 version of G.L. c.260, § 2A.

This Court is not persuaded by plaintiffs' argument that footnote 12 of Ferriter should be construed to apply only to children who where minors when the injury occurred, but became adults before Ferriter was decided, in order to avoid an unconstitutional denial of the children's rights to due process and equal protection. The Court in Ferriter and in Diaz was drawing a reasonable line to allow limited retroactive operation of the new causes of action created therein. In Diaz, the Court explained that it was unnecessary to confine its decision to prospective operation because the previous rule of law would not have determined the conduct of the litigants, thus the new rule of law would not disappoint an expectation.

Order

For the foregoing reasons it is Ordered that defendants' motions to dismiss be Allowed. The Court takes no action, at this time, on defendants' motions for sanctions in the form of legal fees and costs.

(signed)_____
Robert L. Steadman
Justice of the Superior Court

Dated: August 9, 1983

Commonwealth of Massachusetts

SUFFOLK, ss

SUPERIOR COURT DEPT.
OF THE TRIAL COURT
CIVIL ACTION
No. 62272

JOHN JOSEPH BURKE, et als Plaintiff(s)

v.

ATLANTIC RESEARCH CORPORATION Defendant(s)

Judgment on Motion to Dismiss
(Pursuant to MASS.R.CIV.P.12(b)(9)

This action came on to be heard on the motion of defendant(s) _____ to dismiss the action, and the Court, Steadman, J., presiding, having allowed the said motion, it is hereby ordered and adjudged that the action be dismissed, and that defendant recover costs.

Dated at Boston, Massachusetts, This 21st day of September, 1983.

Form of Judgment approved:

Michael Joseph Donovan,
Clerk of Court

By: (signed) _____
Assistant Clerk

(signed) _____
Justice of the Superior Court
Department

Form Civ.P.46 (2nd Rev.) 10-78 500

A true copy of judgment duly entered on Sept. 23, 1983

RECEIVED AUG 30 1984
(stamp)

Commonwealth of Massachusetts

Appeals Court for the Commonwealth
At Boston, August 29, 1984.

In the case of

JOHN JOSEPH BURKE & others

vs.

ATLANTIC RESEARCH CORPORATION & another
(and a companion case)

pending in the Superior Court for the County of Suffolk

Ordered, that the following entry be made in the docket; viz., —

The judgment is vacated in case No. 83-691, and an order is to enter staying proceedings in that case pending action of the board. The dismissal of the action in case No. 83-1328 is affirmed.

So ordered.

By the Court (signed), Clerk.

August 29, 1984

NOTE:
The original of the within rescript will issue in due course, pursuant to M.R.A.P. 23. APPEALS COURT

RELEASED AUG 29 1984
(stamp)

S. 83-691
83-1328

Appeals Court

JOHN JOSEPH BURKE & others[1] vs.
ATLANTIC RESEARCH CORPORATION & another[2]
(and a companion case).[3]

DREBEN, J. Two cases consolidated in this court for purposes of argument arise out of a June 26, 1968, injury to an employee who has been receiving worker's compensation since that date.

1. One action was brought in 1983 by the children of the employee for loss of parental society and was dismissed on motions of the defendants, the employer and a third party, on the authority of Ferriter v. Daniel O'Connell's Sons, 381 Mass. 507, 516-517 n.12 (1980). Footnote 12 of that case states that "where a spouse's claim for loss of consortium has been concluded by...the running of limitations before [the opinion in Ferriter]..., no child's action for loss of parental society thereafter instituted and arising from the same incident will be allowed, even if that action would not

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[1] Mary Teresa Burke and Ann Francis Burke.
[2] Louis Pasqualucci & Sons, Inc.
[3] Hartford Accident and Indemnity Company vs. Atlantic Research Corporation.

otherwise be barred by limitations." The wife's claim was barred after June, 1970, under G.L. c.260, § 2A, prior to its amendment by St. 1973, C.777, § 1. The plaintiffs' claims must, therefore, also fail. Gore v. Daniel O'Connell's Sons, 17 Mass. App. Ct. 645, 649-650 (1984). See also Armstrong v. Carlyle Constr. Col, 532 F. Supp. 939, 941 (D. Mass. 1982); Diaz v. Eli Lilly & Co., 364 Mass. 153, 167 (1973). We find no merit in the argument that Ferriter applies only to children who were minors when the injury occurred but who became adults before Ferriter was decided.

2. The second action was brought by the employer's injuries. After many procedural skirmishes, including an attempt by the employee to remove the insurer's attorney on the ground of conflict of interest, see Burke v. Atlantic Research Corp., 358 Mass. 764 (1971), and unsuccessful efforts by the employee's wife to intervene once on her own behalf and again on behalf of herself and her children, the insurer and the third party arrived at a settlement for which they sought judicial approval. In 1983, at a hearing held solely for the purposes of reviewing the merits of the agreement, a Superior Court judge approved the settlement.[4] A judgment entered awarding the insurer $60,000, an amount less than the sums which had at that time already been paid to the employee.

The employee's wife appeals in two capacities and on different grounds. Her first claim (that she should have been allowed to intervene on behalf of herself and her children after the time permitted under G.L. c.260, § 2A) needs no discussion, as it is precluded by part 1 of this opinion and by Ferriter and Diaz.

As guardian of the employee,[5] his wife also urges that the judge did not have jurisdiction to approve the settlement because that function, under c.152, § 15, belongs to the Industrial Accident Board (board). The language of that section, as in effect at the time of the employee's injury, leads us to conclude that the judge should have given the board an opportunity "to apply its expertise to the statuatory scheme." Assuncao's Case, 372 Mass. 6, 9 (1977).

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[4] Approval of the same settlement had also been sought in 1980, and a hearing confined to issues concerning settlement was held before a different judge. He denied approval without prejudice.

[5] In 1980 the wife was appointed guardian of her husband, a mentally ill person.

The applicable statute is G.L. c.152, § 15, as in effect prior to St. 1971, c.888, § 1 (see § 2). Section 15 permitted the insurer, if the employee elected to be compensated under c.152, to enforce the liability, if any, of a person other than the insured and to retain from the sum recovered the amounts paid by it to the employee, with four fifths of the excess going to the employee. The statute also provided: "Except in the case of a settlement by agreement by the parties to, and during a trial of, such an action at law, no settlement by agreement shall be made with such other person without the approval of the industrial accident board after an opportunity has been afforded both the insurer and the employee to be heard on the merits of the settlement and on the amount, if any, to which the insurer is entitled out of such settlement by way of reimbursement...In the case of a settlement by agreement by the parties to, and during a trial of, such an action at law the justice presiding at the trial shall have...all the powers hereinbefore granted to the industrial accident board. An employee shall not be held to have exercised his option under this section to proceed at law if, at any time prior to trial of an action at law brought" against the third person he shall discontinue such action (emphasis supplied).

We think the employee's position that the settlement in this case was not made "during a trial" and that the judge was not "presiding at" such trial when he approved the settlement is correct. While it may be argued with some plausibility that the term "trial" in the first quoted portion of the statute is ambiguous, see Globe Newspaper Co. v. Superior Court, 379 Mass. 846, 851, vacated and remanded on other grounds, 449 U.S. 894 (1980), S.C., 383 Mass. 838 (1981), rev'd on other grounds, 457 U.S. 596 (1982), the term "trial" in the context used in the last quoted sentence has a definite meaning.

Prior to the adoption of the Massachusetts Rules of Civil Procedure (see now Mass.R.Civ.P. 41[a], 365 Mass. 803 [1974], and Reporters' Notes thereto, Mass. Ann. Laws, Rules of Civil and Appellate Procedure, at 187 [Law. Co-op. 1982]), a plaintiff could discontinue an action at law "as of right at any time before the trial." Carpenter & Sons v. New York, N.H. & H. R.R., 184 Mass. 98, 100 (1903). Marsch v. Southern New England R.R., 235 Mass. 304, 307 (1920). Burnham v. MacWhinnie, 350 Mass. 17, 18-19 (1965), S.C., 352 Mass. 466 (1967). As pointed out in Marsch v. Southern New England R.R., 235 Mass. at 307, "trial" in this context meant " '[t]he examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue.'...The opening of the case to the jury or to the court, if a jury has not been called for, fixes the time after which a plaintiff cannot discontinue as matter of right."

This established meaning of the term "trial" in the portion of the statute which permits the employee to discontinue his action "at any time prior to trial" lends meaning to the term "trial" used earlier. We see no reason to depart from the ordinary rule that "in the absence of a plain contrary indication, a word used in one part of a statute in a definite sense should be given the same meaning in another part of the same statute." Plymouth County Nuclear Information Comm., Inc. v. Energy Facilities Siting Council, 374 Mass. 236, 240 (1978). The settlement occurred prior to any "examination" of "the facts put in issue" in the action and thus was not made "during a trial."

Nor does the reconstructed transcript agreed to by the parties convert the hearings before the judge into a "trial." The transcript indicates that the insurer and the third party were prepared to impanel a jury and make opening statements before reading the agreement into the record. Had

that been done, the board's approval would nevertheless have been required.[6] The statutory exception is directed to a situation where, "during a trial" of the issues of fact, the parties arrive at a settlement. If that occurs, the presiding judge, instead of the board, is authorized to approve the settlement. The agreement reached here long preceded any trial and does not fall within the statutory exception. We hold, therefore, that the judge should not have entered judgment without approval of the settlement by the board. See generally Murphy v. Administrator of the Div. of Personnel Admn., 377 Mass. 217, 221 (1979).

The judgment is vacated in case No. 83-691, and an order is to enter staying proceedings in that case pending action of the board. The dismissal of the action in case No. 83-1328 is affirmed.

So ordered.

[6] Counsel for the insured took the position that the hearing was not a trial for the purposes of the statute. The judge indicated that there was no need to impanel a jury.

Commonwealth of Massachusetts

SUFFOLK, ss.

SUPERIOR COURT DEPT.
OF THE TRIAL COURT
CIVIL ACTION

No. 62272

JOHN JOSEPH BURKE, et als, Plaintiff(s)

v.

ATLANTIC RESEARCH CORPORATION, Defendant(s)

Judgment for Defendant(s) After Rescript
Pursuant to MASS.R.A.P.28)

This action was appealed to the Appeals Court the issues having been duly heard and the Appeals Court having duly issued a rescript, it is ordered and adjudged:

The Complaint of the plaintiffs is dismissed.

A true copy of judgment duly entered on Jan. 24, 1985

Dated at Boston, Massachusetts, this 23rd day of Jan. 1985.

MICHAEL JOSEPH DONOVAN,
Clerk of Court.

By: (signed)_____, Asst. Clerk

Commonwealth of Massachusetts

SUFFOLK, ss. SUPERIOR COURT DEPT.
C.A. No. 62272

JOHN JOSEPH BURKE, MARY TERESA
AND ANN FRANCIS BURKE

vs.

ATLANTIC RESEARCH CORPORATION and
LOUIS PASQUALUCCI & SONS, INC.

Statement of Proceedings

Plaintiffs in this action are the children of John Burke (their mother, Mary Burke, has been removed as a plaintiff because all other plaintiffs are adults). Their claim is for loss of his care, comfort and society due to his injury at work on June 26, 1968.

This action was commenced on June 15, 1983. Plaintiff John Joseph Burke was born June 25, 1963, and plaintiffs Mary Teresa and Ann Francis Burke, twins, were born on December 29, 1964.

Defendant Pasqualucci was Mr. Burke's employee, and plaintiffs allege defendant Atlantic owned or controlled the premises where his injury occurred. Plaintiffs seek damages from both defendants for negligently causing Mr. Burke's injury, jointly or severally. Defendants have never answered these allegations as their motions to dismiss, brought prior to answering, were allowed.

This is a companion case to the one brought by the workmen's compensation insurer, Hartford (originally commenced in Mr. Burke's name but later amended to

name Hartford as the plaintiff) against Atlantic for Mr. Burke's injury. Hartford has paid Mr. Burke workmen's compensation since the accident. That complaint was filed in 1969, Suffolk Superior Court No. 646488. Mrs. Burke moved to intervene and add Pasqualucci as a defendant, to raise her loss of her consortium claims and her children's (the present plaintiffs) loss of parental care claims against both Atlantic and Pasqualucci. However, that mostion was denied in January 1983. That case was settled in 1983 over Mrs. Burke's objection (acting as Mr. Burke's guardian). Mrs. Burke appealed from the judgment based on the settlement and from the denial of her motion to intervene. The appeal is now pending in the Court of Appeals, Number 83-691.

In the instant case both Atlantic and Pasqualucci moved to dismiss based on the alleged pendency of the companion case and on the statute of limitations. Justice Robert Steadman allowed their motions, as set forth in his August 9, 1983 Memorandum and Order. The final judgment entered on September 21. 1983.

JOHN JOSEPH BURKE, et al
By their attorneys,
GARGANO & PIPER

(signed)_____
Carol Petsko Orme-Johnson
One Broadway
Cambridge, MA 02142
Tel. 354-1100

Commonwealth of Massachusetts

SUFFOLK, ss. SUPERIOR COURT DEPT.
C.A. No. 62272

JOHN JOSEPH BURKE, MARY TERESA
AND ANN FRANCIS BURKE
vs.
ATLANTIC RESEARCH CORPORATION and
LOUIS PASQUALUCCI & SONS, INC.

Notice of Appeal

Notice is hereby given that all the above named plaintiffs hereby appeal to the Appeals Court from the memorandum and order on defendants' motions to dismiss entered on August 9, 1983 by the Honorable Robert L. Steadman, and from the judgment entered on September 21, 1983.

JOHN JOSEPH BURKE, et al
By their attorneys,
GARGANO & PIPER

(signed)
Carol Petsko Orme-Johnson
One Broadway
Cambridge, MA 02142
Tel. 354-1100

Certificate of Service

I, Carol Petsko Orme-Johnson, Esquire hereby certify that on the 28th day of September, 1983 I served the within Notice of Appeal by mailing a copy of same postage prepaid to:

Philip Foley, Esquire
Cornell & Gollub
75 Federal Street
Boston, MA 02110

John Finnerty, Esquire
40 Broad Street
Boston, MA 02109

Signed under the pains and penalties of perjury.

(signed)
Carol Petsko Orme-Johnson

Commonwealth of Massachusetts

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 62272

JOHN JOSEPH BURKE, AND
MARY B. BURKE AS
NEXT FRIEND OF MARY TERESA AND
ANN FRANCIS BURKE,
Plaintiffs

vs.

ATLANTIC RESEARCH CORPORATION AND
LOUIS PASQUALUCCI & SONS INC.,
Defendants

Complaint and Jury Demand

COUNT I

1. Plaintiff, John Joseph Burke born on June 25, 1963, resides at 1650 Dorchester Avenue, Dorchester, Massachusetts.

2. Plaintiff, Mary Teresa Burke born on December 29, 1964, resides at 1650 Dorchester Avenue, Dorchester, Massachusetts.

3. Plaintiff, Ann Francis Burke, born onDecember 29, 1964, resides at 1650 Dorchester Avenue, Dorchester, Massachusetts.

4. Plaintiff Mary Burke is the mother and next friend of Mary Teresa and Ann Francis Burke.

5. On or about June 25, 1968 and June 26, 1968, John J. Burke the husband of Mary B. Burke and father of the other

three Plaintiffs, while working on the premises of Defendant Atlantic Research Corporation, was seriously injured as a result of the negligence of the Defendant, Atlantic Research Corporation, which failed to make its premises safe.

6. As a result of said negligence plaintiffs, John Joseph Burke, Mary Teresa Burke and Ann Francis Burke, have been deprived for an extended period of time of the care, comfort, and society of their father, John J. Burke.

WHEREFORE, the Plaintiffs, John Joseph Burke, Mary Teresa Burke and Ann Francis Burke, demand judgement against the Defendant, Atlantic Research Corporation in the amount of $750,000 together with interest and costs.

COUNT II

7. The Plaintiffs repeat and reallege paragraphs 1-6.

8. Defendant, Louis Pasqualucci & Sons, Inc., is a corporation duly organized under the laws of the Commonwealth of Massachusetts and having a usual place of business at 40 Summer Street, Quincy, Massachusetts.

9. On or about June 25, 1968 and June 26, 1968, John J. Burke, while working for Defendant Louis Pasqualucci & Sons, Inc., was seriously injured as a result of the negligence and/or gross negligence of said Defendant, its agents, servants and/or employees.

10. As a result of said negligence of the Defendant Louis Pasqualucci & Sons, Inc., the Plaintiffs have been deprived for an extended period of time of the care, comfort, and society of their father, John J. Burke.

WHEREFORE, the Plaintiffs, John Joseph Burke, Mary Teresa Burke and Ann Francis Burke, demand judgment against the Defendant, Louis Pasqualucci & Sons Inc., in the amount of $750,000 together with interest and costs.

Plaintiffs demand trial by jury.

By their attorney,

(signed)
Carol Petsko
GARGANO & PIPER
One Broadway
Cambridge, MA 02142
(617) 354-1100

Commonwealth of Massachusetts

SUFFOLK, ss. SUPERIOR COURT
C.A. NO. 62272

JOHN JOSEPH BURKE, et al
Plaintiff

vs.

ATLANTIC RESEARCH CORPORATION,
and LOUIS PASQUALUCCI & SONS, INC.,
Defendants

Motion to Dismiss

Now comes the defendant, Louis Pasqualucci & Sons, Inc., and moves this Court pursuant to Mass. R. Civ. P. Rule 12(b)(9) to dismiss the plaintiff's complaint in the above captioned matter. The defendant also moves for the imposition of sanctions in the form of attorneys' fees for the marking of this motion. The defendant's accompanying Memorandum of Law In Support Of This Motion.

LOUIS PASQUALUCCI &
SONS, INC.
By its attorney,

(signed)_____
Philip J. Foley
CORNELL & GOLLUB
75 Federal Street
Boston, MA 02110
(617) 482-2068

Commonwealth of Massachusetts

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 62272

JOHN JOSEPH BURKE, et als
Plaintiffs

vs.

ATLANTIC RESEARCH
CORPORATION, et al,
Defendants

Motion of Defendant, Atlantic Research Corporation, to Dismiss, and for Costs

Now comes the defendant, Atlantic Research Corporation, and moves this Honorable Court, pursuant to Mass. R. Civ. P. Rule 12(b)(9) to dismiss the plaintiff's complaint in the above-entitled action. The defendant also moves for the imposition of this action, including review of file, legal research, preparation and filing in Court of various documents and Court Appearance in support of said defendant, Atlantic Research Corporation's Motion To Dismiss.

By its attorneys,

By: (signed)
JOHN F. FINNERTY
40 Broad Street
Boston, Mass. 02109
426-6730

Commonwealth of Massachusetts

SUFFOLK, ss. SUPERIOR COURT
C.A. No. 62272

JOHN JOSEPH BURKE, et al

vs.

ATLANTIC RESEARCH CORPORATION, et al

Plaintiffs' Motion to
Amend Complaint

Plaintiffs move to amend the complaint as follows on the grounds that Mary Teresa Burke and Ann Francis Burke are adults:

A. Delete from list of plaintiffs in heading "Mary B. Burke as Next Friend of"

B. Delet paragraph 4.

Plaintiffs further move to insert a new paragraph 4 on the grounds that the jurisdictional allegations regarding defendant Atlantic were inadvertently omitted from the complaint, to read as follows:

"4. Defendant Atlantic Research is a division of Susquehana Corporation, a Delaware corporation, and was at the time of the accident complained of doing business in Cohasset, MA, and is subject to the court's jurisdiction under G.L. c.223A, § 3 (c and d)."

JOHN JOSEPH BURKE, et al
By their attorneys,
GARGANO & PIPER
(signed)
Carol Petsko
One Broadway
Cambridge, MA 02142
Tel. 354-1100

Footnote 12 of Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 516-517, 413 N.E.2d 690, 696 (1980), provides:

> 12. For reasons similar to those expressed in Diaz, we declare that, where a spouse's claim for loss of consortium has been concluded by judgment or settlement or the running of limitations before this opinion comes down, no child's action for loss of parental society thereafter instituted and arising from the same incident will be allowed, even if that action would not otherwise be barred by limitations. See Diaz v. Eli Lilly & Col., 364 Mass. 153, 167, 302 N.E.2d 555 (1973).

G.L. c.201
§ 34. Appointment; effect

If, under the terms of a written instrument or otherwise, a minor, a mentally retarded person, or person under disability, or a person not ascertained or not in being, may be or may become interested in any property real or personal, or in the enforcement or defense of any legal rights, the court in which any action, petition or proceeding of any kind relative to or affecting any such estate or legal rights is pending may, upon the representation of any party thereto, or of any person interested, appoint a suitable person to appear and act therein as guardian ad litem or next friend of such minor, mentally retarded person or person under disability or not ascertained or not in being; and a judgment, order or decree in such proceedings, made after such appointment, should be conclusive upon all persons for whom such guardian ad litem or next friend was appointed.

G.L. c.260

§ 7. Disabilities; minors, etc. If the person entitled thereto is a minor, or is insane or imprisoned when a right to bring an action first accrues, the action may be commenced within the time hereinbefore limited after the disability is removed.

M.R. Civ. P.
Rule 17. Parties Plaintiff and Defendant: Capacity

(b) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise representated in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

U.S. Constitution

Amendment XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.